(3)

Supreme Court, U.S.
FILED
DEC 31 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-603

In the Supreme Court of the United States

OCTOBER TERM, 1985

ESTATE OF ALICE B. SMITH

Petitioner,

V.

UNITED STATES OF AMERICA

Respondent.

Reply Brief on behalf of the Estate of Alice B. Smith

JOHN McENERY ROBERTSON
636 First NBC Building
210 Baronne Street
New Orleans, LA 70112
Telephone: (504) 525-9823
Counsel for Petitioners

Counsel of Record

BEST AVAILABLE COPY

8 pp

TABLE OF AUTHORITIES

page

Cases Cited

U.S. v. Boyle, executor of the estate of Boyle, ____ U.S. ____, 105 S. Ct. 687-690, 83 L. Ed. 2d. 622 (1985). 4

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

MAY IT PLEASE THE COURT:

The Memorandum for the United States in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed herein lays great stress upon the fact that the question is purely factual and that the Estate Tax Return was filed late and that factually the late filing could not be excused as being due to "reasonable cause". HOWEVER, The Memorandum for the United States in Opposition does not answer the factual position of this case that the estate was amply solvent and at any time a payment could have been made which would have obviated a penalty.

A payment was not made because on two occasions, May 2, 1975 and July 15,

1975 in Form 4768, Application for Extension of Time to File U.S. Estate Tax Return and/or Pay Estate Tax, the Executor advised that the appraisals of minerals rights had been completed and both Forms 4768 included the question "PLEASE ADVISE IF WE SHOULD MAIL A PAYMENT TO AVOID ANY PENALTY" (Capitals added). On both occasions the IRS gave the Executor erroneous advice by stating "Please attach a copy of this form to the return when filed" on the first occasion and on the second occasion, "You should attach a statement to the return when filed stating why the return could not be filed timely."

The record is complete and shows from the findings of both lower courts, the Executor had no experience in estate tax matters and did not know that a payment would have obviated a penalty.

He would have made such a payment if the IRS had responded correctly to his request.

It is respectfully submitted that the IRS had an obligation to answer the question fully or if it did not wish to answer the question fully, to state that the Executor should receive advice from another source, however, it is respectfully pointed out that the Executor, as any good lawyer, not knowing the state of the law, attempted to receive advice from the ultimate expert in all tax matters, the Internal Revenue Service, and received erroneous advice.

Having given the Executor erroneous advice, in that he was lulled into a sense of security by the statement "You should attach a statement to the return when filed stating why the return could not be filed timely", it is erroneous to

say the least for the Internal Revenue Service to now exact a penalty after the Executor had relied on its erroneous advice.

If the IRS had advised the Executor to file a return or make a payment on the basis of the mineral rights, which had been appraised, and make a partial payment, then of course there would be no penalty, not having done so, the IRS should not be allowed to exact a penalty when its own regulations, as quoted in this Honorable Court's opinion, in U.S. vs. Boyle, Executor of the Estate of Boyle, _____ U.S. _____, 105 S.Ct. 687, 690, 83 L.Ed.2d 622, in n. 8, which specifically holds that the reliance of the taxpayer on erroneous advice of the Internal Revenue Service is LEGAL reasonable cause.

The Supreme Court has clearly pointed out that there are two reasonable causes, one is factual and one is legal. The question before this court is that legally the taxpayer had reasonable cause to reply on the erroneous advice of the Internal Revenue Service.

The Memorandum for the United States in Opposition makes no argument about "Legal Reasonable Cause". Therefore, it is axiomatic that they have admitted that there is "Legal Reasonable Cause" and that the penalty should not be exacted in this case.

RESPECTFULLY SUBMITTED

JOHN McENERY ROBERTSON
COUNSEL FOR PETITIONER